NTSB Order No.
EM-24

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.,
on the 24th day of May 1972.

CHESTER R. BENDER, Commandant, the United States Coast Guard

vs.

CHARLES L. MAULL, Appellant.

Docket ME-23

OPINION AND ORDER

The appellant, Charles L. Maull, has appealed from the decision of the Commandant sustaining the revocation of his license (No. 367410), merchant mariner's document (No. Z-1199556-D1), and all other seaman's documents for misconduct aboard ship.[1] It was found that the appellant, while employed as a third mate on the SS STEEL VOYAGER during a round-trip voyage to India, had assaulted and battered another third mate aboard the vessel, one George S. Haswell, on November 21, 1969, and again on March 1, 1970.

The Commandant's action was taken on appellant's prior appeal (Appeal No. 1845) from the initial decision of Coast Guard Examiner Archie R. Boggs, rendered after a full evidentiary hearing.[2] Throughout these proceedings, appellant has been represented by counsel.

According to the undisputed evidence at the hearing, appellant attacked Haswell on the earlier date by pushing him against a bulkhead in the officer's recreation room and, when Haswell objected, pushed him again. Appellant raised the defenses of provocation, that roughhousing or "horseplay" are to be expected

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[1]The Commandant's action was taken pursuant to 46 U.S.C. 239(g). The appeal to this Board is authorized by 49 U.S.C. 1654(b)(2) and is governed by rules of procedure set forth in 14 CFR 425.

[2]Copies of the decisions of the Commandant and the examiner are attached hereto.

occasionally in a seaman's life,[3] and that no logbook entry of the offense had been made by the master.

With respect to the second incident on March 1, 1970, which took place about 6 p.m. while appellant and Haswell were alone in the latter's darkened room, their testimony was highly conflicting. Haswell testified that appellant entered his room, knocked him down on his bunk, and hit him on the head with a bottle. His head injuries were extensive and serious. Appellant admitted that he hit Haswell several times with a whiskey bottle, but maintained that he was acting in self-defense. The examiner found that the testimony of a third witness, who entered the room after hearing the disturbance and saw appellant with the broken neck of the bottle in his right hand, standing over Haswell's conscious but inert body, corroborated Haswell's version.

The examiner virtually disregarded the first offense in assessing sanction and imposed the revocation order because of appellant's "dangerous proclivities and propensities" exhibited by his ultimate attack upon Haswell. Despite appellant's good prior record, the examiner determined that the sanction was necessary as a remedial measure to protect other seamen from his possible future attacks. We read the Commandant's decision as making the same determinations essentially.

In his brief on appeal, appellant contends that the examiner's findings are not consistent with the evidence wherein he raised defenses that Haswell "provoked and initiated" both incidents and was the aggressor during the second incident, making his own retaliation with a whiskey bottle a necessary action in self-defense. Appellant also seeks reduction of the sanction because of the "vague, uncertain and dubious evidence" against him. Counsel for the Commandant has not filed a reply brief.

Upon consideration of appellant's brief and the entire record, the Board dismisses appellant's pushing offense but concludes that the evidence of his serious misconduct on March 1, 1970, prevailed over his affirmative defenses. We further conclude that the examiner's findings concerning the latter offense are supported by the weight of the substantial, reliable, and probative evidence of record. We adopt these findings as our own, to the extent not modified herein. Moreover, we agree with the examiner and the Commandant that the revocation action is justified.

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[3]The Commandant's finding that there is nothing in the record to indicate that a defense of "horseplay" was raised at the hearing is in error (Tr. 24), but not significant in view of our decision herein.

On the issue of provocation, the record indicates by way of disinterested testimony, as well as the testimony of appellant, that Haswell was a source of irritation to others generally during the voyage and to appellant in particular. It fairly appears that Haswell had alcoholic tendencies, although appellant's assertion that he was often relieved on the night watch by Haswell, in a drunken condition, was not supported by the master, who testified that he had checked into the matter. Haswell denied being drunk on these particular occasions, but freely admitted that he was late at times in relieving appellant on watch, which the latter testified had happened frequently. In addition, a question to Haswell as to whether he had made "indecent proposals" to appellant was excluded by the examiner, although this might have elicited further evidence of provocation.

We disagree with the examiner's finding that the pushing offense was without provocation. Haswell, looking at the floor for another officer's watchpin, was asked by appellant what the officer had lost and replied, "His mind." The remark was subtly provocative, and, given Haswell's penchant for purposely aggravating him, appellant's angry reaction was perhaps understandable. In any event, the incident was short-lived, no harm was done, and both parties testified that their relationships soon returned to normal. These conditions, combined with the mitigating effect of Haswell's pattern of provocation, and the failure of the master to log appellant for the offense, lead us to conclude that his culpability for pushing Haswell was so slight as not to be actionable under the misconduct regulations of the Coast Guard.

In appellant's version of the incident on March 1, 1970, Haswell again provoked him by knocking his porthole screen in on him while he was resting on his bunk. Appellant quickly dressed and went out into the passageway to Haswell's room next-door. He asked Haswell, standing in his own doorway with a drink in his hand, why he had done this. Haswell dropped the drink and grabbed appellant around the neck, after which appellant testified:

> "I was surprised and my reflexes tried to get away from him; in doing so I slipped and my feet went completely out from under me. He staggered back with my weight which pushed him back... I was on my knees in front of him and he pulled--he went back...over against his rack so he was partially on his rack--with his back across his rack and...he has got my face made up to his body--in his clothing and I couldn't breathe." (Tr. 133.)

He tried to twist his head and "in turning it" saw the whiskey

bottle on a table next to the bed. He picked up the bottle and began swinging at Haswell to "get loose."

In Haswell's version, appellant attacked him almost immediately after he entered his room, and this fact was corroborated by a witness who was there within seconds after hearing the disturbance. The witness testified that Haswell had just left him in the officer's recreation room (referred to as the "saloon") to go to his own room "about three or four doors away," and that "there was not enough time actually [for Haswell] to do anything except walk down" to it before the disturbance began (Tr. 83). No reason is presented, and we find none, for challenging the examiner's finding of corroboration, including the key fact that only a brief span of time was involved.

In pleading self-defense after beating Haswell senseless with the bottle, appellant was required to show not only that Haswell was the aggressor but that he was so overwhelmed and in fear of present danger that he had to resort to excessive force to save himself. The theory appellant propounded was that he was being strangled by Haswell's armhold around his neck and that he was suffocating. That he was momentarily in such a grip would be within the realm of plausibility. That he was in extremis and could reasonably fear suffocation in such a short time would not.

Added to the short time factor established by the evidence, the record also shows that in all previous dealings appellant exuded confidence that he could beat Haswell in a fight. He, not Haswell, was the intimidator. If there was any physical disparity between them, it favored appellant who stood 6'7" and weighed 240 pounds, while Haswell was 6'2" tall and weighed 205 pounds. The examiner observed that both men were "young and of very large physical stature and appear to be in excellent physical condition."

The examiner made no finding as to who was the aggressor on March 1, 1970. Since there were no bystanders, and the examiner made no credibility findings, this is not established. Nevertheless, we agree with him that appellant was greviously at fault in attacking Haswell, since the record lends far more support to Haswell's version than to his. Even by appellant's account, within the established time frame, we would hold that his actions exceeded the degree of violence permissible in self-defense.

The record establishes to our satisfaction that Haswell provoked and enraged appellant by knocking in his window screen. Some form of physical retaliation was undoubtedly to be expected, measured according to the disposition of "ordinary men of the

calling" serving in the merchant marine.[4] However, a prank of this sort would be utterly insufficient to justify or even mitigate the excessive retaliation which was established in this instance. The wanton violence, irrespective of provocation, perpetrated by appellant demonstrates the necessity of removing him from the shipboard environment for the protection of other seamen who may, wittingly as did Haswell, or otherwise, incur his wrath. We agree with the examiner that appellant represents a clear threat to the safety and welfare of others aboard ship and that the sanction herein is warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal is hereby denied insofar as appellant's misconduct on March 1, 1970, is concerned and granted as to the misconduct found on November 21, 1969;

2. The findings of the Commandant and the examiner are hereby dismissed concerning appellant's misconduct on November 21, 1969, and hereby affirmed as to appellant's misconduct on March 1, 1970; and

3. Based on appellant's misconduct on March 1, 1970, the orders of the Commandant and the examiner revoking appellant's license and all other seaman's documents be and they hereby are affirmed.

REED, Chairman, LAUREL, McADAMS, THAYER, and BURGESS, Members of the Board, concurred in the above opinion and order.

(SEAL)

[4] Boudoin v. Lykes S.S. Co., 348 U.S. 336, 339 (1955).